Supreme Court, U.S.
FILED

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No.

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PHIL BERG
vs.
LOUIS B. KOZLOFF

On Petition for Writ of Certiorari From the
Supreme Court of Pennsylvania,
No. 39 M.D. Appeal Docket 1998

PETITION FOR A WRIT OF CERTIORARI

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45 pp.

QUESTION PRESENTED

Pursuant to the Pennsylvania statute 25 P.S. 2872.1(3), the only state with a county requirement without regard to population, which requires a candidate for governor to have 2,000 signatures including 100 in at least ten counties, Petitioner's name was stricken from the primary election ballot in which he sought the Democratic gubernatorial nomination, after a challenge in which it was determined that his total number of signatures (over 3,000) fell five short of the tenth county requirement. The Supreme Court of Pennsylvania in affirming the Commonwealth Court's ruling as to the constitutionality of the election code provision raises the question presented herein. Is the Pennsylvania statute, which requires a gubernatorial candidate to have 2,000 signatures including at least 100 signatures in ten counties without regard to an equality of population distribution within Pennsylvania's 67 counties, unconstitutional and is violative of Petitioner's rights since it denies ballot access, violative of the right of association, the right of franchise and of equal protection and due process of the First and Fourteenth Amendments of the U.S. Constitution? Ancillary to the issue is that of the appropriate standard of review; that of strict scrutiny rather than rational basis; and of the proper classification of the gubernatorial election as subject to one person - one vote principle.

PARTIES TO THE PROCEEDING

Petitioner---Phil Berg, Democratic Candidate for the Office of Governor of Pennsylvania.

Respondent---Louis B. Kozloff

Pursuant to Pa. R.C.P. 235, and U.S. Supreme Court Rule 29.4(c), the Attorney General of the Commonwealth of Pennsylvania has been given notice of this appeal.

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A. Opinion of the Supreme Court of Pennsylvania, Middle District, dated May 15, 1998, and filed in support of the per curiam order of the Court dated May 11, 1998.....1a - 10a

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OPINIONS BELOW

The unreported Opinion of the Supreme Court of Pennsylvania, Middle District, dated May 15, 1998, and filed in support of the per curiam order of the Court dated May 11, 1998, is produced in Appendix A, page 1a.

The reported Opinion of the Commonwealth Court dated April 7, 1998 is produced in Appendix B, page 11a.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on May 11, 1998 - (Appendix A). The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions.

The First Amendment of the United States Constitution provides, in pertinent part:

Congress shall make no law...

> abridging the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law; or deny any person within its jurisdiction the equal protection of the laws.

STATUTES AND PROCEDURAL RULES INVOLVED

Pennsylvania statute 25 P.S. 2872.1(3) (Act of June 3, 1937, P.L. 1333) provides:

> Candidates for nomination of offices listed below shall present a nominating

> petition containing at least as many valid signatures registered and enrolled members of the proper party as listed below:
> (3) Governor: Two thousand including at least one hundred from each of at least ten counties.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and the
Associate Justices of the Supreme Court:

Phil Berg Petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

STATEMENT OF THE CASE

Petitioner Phil Berg entered a serious and substantial

campaign to run for Governor of Pennsylvania in the Democratic primary scheduled on May 19, 1998. On March 10, 1998, Berg filed a Nomination Petition of 3,056 signatures from 36 counties and 100 or more from ten counties. On March 17, 1998, a challenge was filed as to the signatures from Dauphin County, which resulted in the Commonwealth Court ruling that Berg was five signatures short of the 100 signature requirement in Dauphin County, thereby resulting in only nine county compliance of the ten county requirement. As part of the hearing, Berg raised a challenge to the constitutionality of the statute resultant from the unequal population distribution within the counties and the disparate effect that the statute had upon equal protection and due process.

On April 7, 1998, Judge Doyle of the Commonwealth Court entered an Order striking the name of Berg from the primary election ballot and denying the constitutional challenge to the statute. A timely appeal was thereafter filed to which the Supreme Court of Pennsylvania affirmed the decision of the Commonwealth Court.

PENNSYLVANIA SUPREME COURT PROCEEDING:

Timely notice of Appeal to the Supreme Court of

Pennsylvania was filed by Berg and resulted in the affirming of the decision of the Commonwealth Court. The inquiry was focused upon the constitutionality of the statute at issue, affirming the application of the rational basis test rather than strict scrutiny on the basis that the signature requirement did not have an appreciable impact on the franchise rights of voters and further opining that the state interest in managing ballot size and ensuring the seriousness of candidates provided a rational basis for the statute.

PENNSYLVANIA COMMONWEALTH COURT PROCEEDING:

Before the Commonwealth Court was the petition to set aside the nomination petition of Phil Berg as a candidate for the office of Governor as well as Berg's motion to dismiss based upon the challenge to the constitutionality of the election code, Act of June 3, 1937, P.L. 1333 as amended 25 P.S. 2872.1(3). The Opinion and Order by the Honorable Joseph T. Doyle was dated April 7, 1998, setting aside the nomination petition and holding the election code provision as constitutional.

In his address, Judge Doyle first determined the level of

review to be applied to the election code provision as that of rational basis, rejecting that the provision affected a fundamental right which in turn would require strict scrutiny. Further the Court opined that the "one man - one vote" principle is not implicated by an executive office.

> Clearly the governor is not a legislator in the sense that he does not espouse the cause of a particular constituency, but is rather the chief executive. Therefore, the representational concerns at the core of the one man - one vote principle does not apply.

In applying the rational basis test, the Court noted that the avoidance of ballot clutter and the securing of obtaining signatures beyond the most populous of counties as mandated by the ten county requirement sufficiently supports the state purpose:

> ...[this] minimal inequality is insufficient to support a finding that the statute fails the rational basis test.

Accordingly, the provision within the election code was held as constitutional and the nomination petition of Berg was set aside and his name stricken from the ballot.

REASONS FOR GRANTING THE WRIT

The decision in this case in which the requirement of 25 P.S. 2872.1(3) of obtaining 100 signatures from at least ten counties in order to fulfill the gubernatorial nomination petition for ballot placement in Pennsylvania was deemed constitutional stands as a violation to the First and Fourteenth Amendments, denying equal protection, due process, right of association, and the right of franchise. Any procedures enacted by the state as an integral part of the election process must neither abridge nor dilute the right to vote, and, if they do so, are so far departed from constitutional principles as to merit review by this Honorable Court.

Petitioner's constitutional claim rests upon the clauses of the First and Fourteenth Amendments in his challenge to a 1937 Pennsylvania election code provision that in essence disregards population distribution of the 67 counties, violates the one person -

one vote principle and dilutes or debases the weight of a citizen's vote.

When a state makes classification as to voters which favor residents of one county over another, a justiciable controversy is presented, for the right of suffrage can be denied by debasement or by dilution as well as by the prohibition of a citizen's free exercise. Moore v. Ogilvie 394 U.S. 814, 89 Sup. Ct. 1493 (1969). It was the Supreme Court that found an Illinois statute which required nomination petitions to be signed by 25,000 voters, including 200 from a minimum of 50 counties to be in violation of due process and equal protection. It was noted that the law applied a rigid formula contrary to the constitutional theme of equality among citizens exercising their right to vote and accordingly could not stand.

This principle of one person - one vote was held to be applicable not only to elections as to representative races, but to executive as well. Caselaw has deemed the principle applicable to the candidacy for electors of the President and Vice President. (Moore v. Ogilvie, 394 U.S. 814, 89 Sup. Ct. 1493 [1969]); to the Presidency (McCarthy v. Garrahy, 460 F. Supp. 1042, [U.S.D.C., R.I., 1978]; Udall v. Bowen, 419 F. Supp. 746 [S.D. Indiana 1976]).

The one person - one vote principle stands in conflict with the idea that one group can be granted greater voting strength than another. Statutes that have imposed that inequity by enacting distributive requirements for candidate nominating petitions have been stricken as a grave infringement to the Constitution. Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (U.S.D.C., S.D. New York, 1970). This case was affirmed summarily by the U.S. Supreme Court, 400 U.S. 806 (1970). And it has been held that the imposition of even a lesser burden as to distribution requirements within a statute still constitutes an inequality in voting power that can not stand. McCarthy v. Garrahy, 460 F. Supp. 1042 (1978).

In McCarthy, signatures from only five counties were required. In both Blomquist v. Thomsen, 739 F.2d 525 (1984, 10th Circuit) and Communist Party v. State Board of Elections, 518 F.2d 517 (1975, 7th Circuit), signatures from only two counties were required. (It must be noted that in Communist Party, Petition for A Writ of Certiorari was denied by the U.S. Supreme Court). All of these laws were held to be unconstitutional. The statute at issue in Pennsylvania requires signatures from ten counties and further was declared unconstitutional in an unreported U.S. District Court decision in 1979 to which the state did not appeal. The legislature merely repealed it for the offices of U.S. Senator and President but

failed to do so for the office of Governor.

The assessment of any burden imposed by statute regarding the right or power of the vote is reviewed via strict scrutiny. Where the basic right of voting is diluted, the standard of strict scrutiny must be applied, no matter how insignificant the burden on access to the ballot may be. McCarthy.

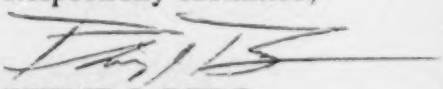
The Pennsylvania statute at issue is the last vestige of signature requirements tied to counties with no regard to the distribution of population. Its effect is undeniable; it stands in violation to the First and Fourteenth Amendments to the Constitution; it challenges the fundamental right to vote and the ancillary principle of one person - one vote. Under its proper review of strict scrutiny, the statute can not stand.

Although Certiorari is rarely granted, in light of the violations to the Constitution that this statute represents, we pray that relief is granted.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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Appendix A

APPENDIX A: OPINION OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT, DATED MAY 15, 1998, AND FILED IN SUPPORT OF THE PER CURIAM ORDER OF THE COURT DATED MAY 11, 1998.

[J-86-1998]
THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN THE MATTER OF: THE NOMINATION PETITION OF PHIL BERG, DEMOCRATIC CANDIDATE FOR THE OFFICE OF GOVERNOR	:	No. 39 M.D. Appeal Docket 1998
APPEAL OF: PHIL BERG	:	Appeal of the Order of the Commonwealth Court at No. 250 M.D. 1998, dated April 7, 1998.
	:	SUBMITTED: APRIL 22, 1998

OPINION

MR. JUSTICE ZAPPALA **FILED: MAY 15, 1998**

This opinion is filed in support of the per curiam order of this Court dated May 11, 1998. The order affirmed an order entered by Judge Doyle of the Commonwealth Court which granted a petition to set aside nomination petition.

Appendix A

On or about March 10, 1998, Phil Berg, Appellant, filed a Nomination Petition with the Secretary of the Commonwealth of Pennsylvania for the office of Governor in the Democratic primary. Berg obtained over 3,000 signatures from 36 different counties in the Commonwealth. Louis Kozloff, Appellee, subsequently filed a Petition to Set Aside the Nomination Petition wherein he contended that Berg did not have 100 valid signatures of Democrats from each of ten counties. Berg filed a Motion to Dismiss the challenge in which he alleged that section 912.1(3) of the Election Code,[1] was unconstitutional.

That section provides as follows:

> Candidates for nomination of offices as listed below shall present a nominating petition containing at least as many valid signatures of registered and enrolled members of the proper party as listed below:
>
> > (3) Governor: Two thousand including at least one hundred from each of at least ten counties.

25 P.S. §2872.1(3).

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[1]Act of June 3, 1937, P.L. 1333, 25 P.S. §2872.1(3).

Appendix A

Berg argued that because of the unequal distribution of population in Pennsylvania's 67 counties, the requirement of 100 signatures from ten counties violated due process, equal protection and the one person/one vote principles pursuant to the First and Fourteenth Amendments of the United States Constitution. He contended that because less populous counties have fewer electors, the signatures of those electors are more "valuable" than those of more populous counties such as Philadelphia or Allegheny. He further contended that the strict scrutiny standard of review should apply.

By Memorandum and Order dated April 7, 1998, Judge Doyle of the Commonwealth Court granted the Petition to Set Aside the Nomination Petition and struck Berg's name from the primary election ballot.[2] He declined to employ the strict scrutiny standard of review on the ground that no fundamental rights were affected by the ten county signature requirement. Judge Doyle held that the one

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[2]Prior to the Commonwealth Court's decision, Berg sought a preliminary injunction in the United States District Court for the Eastern District of Pennsylvania, to enjoin the enforcement of the statute. The court denied the request for a preliminary injunction. Berg's appeal to the United States Court of Appeals for the Third Circuit is currently pending.

person/one vote principles were not applicable in a case involving the nomination of a candidate for Governor because there is no question of unequal *representational* rights.

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Applying the rational basis test, Judge Doyle concluded that the state has several legitimate interests in the statutory signature requirement. He found that the provision keeps the ballot free from chaos by requiring the candidate to have some statewide support and ensures that candidates do not merely obtain signatures from the most populous counties of the Commonwealth. Because the signature requirement was rationally related to the furtherance of the Commonwealth's interest concerning the ballot, Judge Doyle found that it passed constitutional muster. As Berg conceded that his petition did not contain valid signatures of 100 Democratic electors from each of ten counties, further analysis was unnecessary.[3]

Likewise, our inquiry involves only the constitutionality of Section 912.1(3) of the Election Code, as it is undisputed that the

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[3]Berg also filed in our Court an emergency motion to stay the printing of the ballot, which we denied on April 24, 1998.

statutory requirement was not satisfied. We must first identify the type of interest affected by the statutory classification so that we may determine the appropriate standard of review.

> Under a typical fourteenth amendment analysis of governmental classifications, there are three different types of classifications calling for three different standards of judicial review. The first type - classifications implicating neither suspect classes nor fundamental rights - will be sustained if it meets a "rational basis" test. In the second type of cases, where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny. Finally, the third type of cases, if "important" though not fundamental rights are affected by the classification, or if "sensitive" classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review.
>
> [J-86-1998] - 3 -

James v. Southeastern Pennsylvania Transportation Authority, 505 Pa. 137, 145, 477 A.2d 1302, 1305-1306 (1994).

We also recognize that when assessing the merits of a

constitutional challenge to a provision of a state's election code, a court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Council of Alternative Political Parties v. Hooks, 121 F.3d 876 (3rd Cir. 1997).

Berg contends that the strict scrutiny standard of review should apply to ballot issues in the electoral process because the fundamental right to vote is affected. He primarily relies on the United States Supreme Court's decision in Moore v. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493 (1969). In Moore, independent candidates for the office of President of the United States challenged an Illinois law that required candidates to obtain 25,000 signatures, at least 200 from each of 50 of the state's 102 counties, before their names were placed on the general election ballot. The population disparity in

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Illinois was such that 93.4% of the population resided in the 49 most populous counties, with 6.6% of the population residing in the remaining 53 counties. Under the challenged statute, the 6.6% minority could effectively block a candidate from appearing on the ballot against the desires of the majority even though it could not have defeated the candidate in the general election. Accordingly, the Court ruled that the new law unconstitutionally diluted the vote of the more populous counties in the state and

therefore lacked the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.

Moore is distinguishable, however, in two respects. First, the ten most populous counties in Pennsylvania comprise only 59% of the Democratic electors in the Commonwealth, with the remaining 41% distributed among the other 57 counties in the state. Thus, unlike Moore, the instant case does not present a situation where a scant minority of voters in rural areas could "veto" the wishes of the majority. Second, both the number and percentage of counties from which signatures were required was far greater in

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Moore than that imposed by section 912.1(3). In Moore, the statute required 200 signatures from each of 50 of the state's 102 counties, or 49% of the counties in the state. Here, a candidate is only required to obtain 2,000 signatures, at least 100 from each of 10 of the state's 67 counties, or 14.9% of the counties in the state.

This case is more analogous to Cavanaugh v. Schaeffer, 444 A.2d 1308 (Pa. Cmwlth. 1982), where the constitutionality of Section 912(b) of the Election Code[4] was challenged. That provision requires candidates for the office of Justice of the Supreme Court of Pennsylvania to obtain 100 valid signatures from each of 5 counties. The challenge was based on the ground that the geographic distribution requirement set forth in the Election Code violated the equal protection clause of the Fourteenth Amendment.

The Commonwealth Court upheld the constitutionality of the statute. It distinguished Moore v. Ogilvie, finding that the population disparity in

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[4]Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. §2872(b).

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Pennsylvania did not create a situation where a minority of the population possessed a veto power over that of the majority. The court relied upon the proposition that a "discriminatory law must have a real and appreciable impact on voters' rights before the strict scrutiny test of reasonable necessity would be applied in the challenge." Cavanaugh at 1311, citing Bullock v. Carter, 405 U.S. 1234, 144 (1972). It concluded that the signature requirement had no "real and appreciable impact" on the franchise rights of voters and therefore the rational basis test applied. The court held that the state's interests in managing ballot size and in ensuring that there are serious candidates who have a significant modicum of support, provided a rational basis for the challenged law.

Similarly, we find that requiring a candidate to obtain 100 signatures from at least ten counties in the Commonwealth does not have a real and appreciate impact on voter's rights. The state's interest in managing the ballot size and ensuring statewide support for candidates provides a rational basis for the provision.

Although voting is of the most fundamental significance under our constitutional structure, the right to associate for political purposes through the ballot is not absolute. Burdick v. Takushi, 504

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U.S. 428, 112 S. Ct. 2059 (1992). To subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest would be the hands of states seeking to assure that elections are operated equitably and efficiently. Id.

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Accordingly, we find that section 912.1(3) of the Election Code is constitutional. Because Berg failed to obtain 100 signatures from each of at least 10 counties, the Commonwealth Court properly granted the motion to set aside nomination petition.[5]

Mr. Chief Justice Flaherty concurs in the result.

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[5]Berg also contends that the challenge to his nomination petition lacked the required specificity. This claim is meritless as Berg concedes that the petition to set aside nomination petition listed the page number, page and line of each challenged signature and noted that the signatory was not registered in Dauphin County.

Appendix B

APPENDIX B: OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED APRIL 7, 1998.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN THE MATTER OF: THE NOMINATION PETITION OF PHIL BERG, DEMOCRATIC CANDIDATE FOR THE OFFICE OF GOVERNOR	:	No. 250 M.D. 1998
	:	HEARD: March 30, 1998
LOUIS B. KOZLOFF, Petitioner	:	

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE DOYLE **FILED: April 7, 1998**

Before this Court is the petition to set aside the nomination petition of Phil Berg as a candidate, in the primary election of the Democratic Party, for the office of Governor. Additionally before the Court is Berg's motion to dismiss the petition to set aside based

on a challenge to Section 912.1(3) of the Election Code,[1] on constitutional grounds.

The challenge to Berg's nomination petition alleged that, although Berg had accumulated over 3000 signatures statewide, he failed to obtain 100 valid signatures from Democratic electors of 10 counties within the Commonwealth. Specifically, the petition alleged that although Berg had 100 signatures from 9 counties, he did not have 100 valid signatures from Dauphin County, the required tenth county. First, however, we will address Berg's motion to dismiss based on constitutional grounds, because, if we conclude that Section 912.1(3) is unconstitutional, we need not address the issue of whether Berg complied with that Section.

Section 912.1 of the Election Code provides as follows:

> Candidates for nomination of offices as listed below shall present a nominating petition containing at least as many valid signatures of registered and enrolled members of the proper party as listed below:
>
> . . . .

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[1]Act of June 3, 137, P.L. 1333. as amended. 25 P.S. §2872.1(3).

Appendix B

> (3) Governor: Two thousand including at least one hundred from each of at least ten counties.

25 P.S. §2871.1(3) (Ibid). In his petition to dismiss the challenge to his nomination petition, Berg alleges that the requirement of 100 signatures from 10 counties does not in any way reflect the relationship of the population in each county. Therefore, because less-populous counties of this Commonwealth have fewer electors, the signatures of those electors are more "valuable" than those of electors of more populous counties such as Philadelphia or Allegheny.[2] Thus, Berg argues,

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[2]According to the results of the 1990 Census contained in the most recent edition of The Pennsylvania Manual, Volume 113, the top ten counties by population are Philadelphia (1,585,577), Allegheny (1,336,449), Montgomery (678,111), Delaware (547,651), Bucks (541,174), Lancaster (422,822), Chester (376,396), Westmoreland (370,321), York (339,574), and Berks (336,523).

Moreover, by counting only the number of Democratic electors registered to vote in the 1996 General election, the top ten most populous counties are Philadelphia (689,880), Allegheny (517,580), Montgomery (139,401), Westmoreland (130,406), Bucks

application of Section 912.1(3) of the Election Code dilutes the signature of the elector in the more populous areas in violation of the "one man - one vote principle," announced by the United States Supreme Court in Baker v. Carr, 369 U.S. 186 (1962).

At the outset, we note that when assessing the merits of a constitutional challenge to a provision of a state's election code, a court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of those interests; it also

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(124,270), Luzerne (101,503), Delaware (93,686), Lackawanna (85,436), Berks (84,575), and Erie (84,445). The Democratic population of these counties equals approximately 59% of the registered Democratic electors in the Commonwealth.

must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Council of Alternative Political Parties v. Hooks, 121 F.3d 876 (3d. Cir. 1997).

In addressing Berg's challenge, we must first determine what level of review is given to Section 912.1(3). It is well settled that laws which affect a fundamental

right, such as the right to vote, or discriminate against a suspect class of citizens, are subject to strict scrutiny. Brown v. Borough of Mahaffey, 35 F.3d 846 (3d Cir. 1994). Under a strict scrutiny analysis, the burden is on the government to demonstrate that the law is narrowly tailored to achieve a compelling governmental interest. United States v. Burroughs, 897 F. Supp. 205 (E.D. Pa. 1995). Conversely, if a law does not significantly affect a fundamental right or involve a suspect class, it is subject to a rational basis review by the Court. Cavanugh v. Schaeffer, 444 A.2d 1308 (Pa. Cmwlth. 1982) [Ibid]. Under this standard, it is the

plaintiff who bears the heavy burden of overcoming the presumption that there exists a rational relationship between the statute and a legitimate governmental interest. Hahn v. United States, 757 F. 2d 581 (3d Cir. 1985).

In arguing for application of the strict scrutiny standard, Berg initially argues that the current requirements of the Election Code violate the one man - one vote principle, and thus affects a fundamental right, i.e. the right to vote. In support of his argument, Berg initially points to the United States Supreme Court decision in Moore v. Ogilvie, 394 U.S. 814 (1969). In Moore, the Court examined a constitutional challenge to an Illinois law requiring 25,000 signatures statewide, including 200 signatures from 50 of the state's 102 counties before a candidate could be placed on the ballot in the primary election for the office of President of the United States. The population in Illinois was such that 93.4% of the state's population resided in 49 of the counties. Because 6.6% of the remaining population residing in the remaining 53 counties could place a candidate on the ballot, the Court ruled that the law unconstitutionally diluted the "vote" of the more populous counties in the state. Moore has been used as support for striking down

several provisions of other states' election codes. See Socialist Labor Party v. Rhodes, 318 F. Supp. 1262 (S.D. Ohio 1970), appeal dismissed, 409 U.S. 942 (1972) (striking down an Ohio statute requiring independent candidates to have 200 signatures from at least 30 of the state's 80 counties); Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y.), aff'd, 400 U.S. 806 (1970) (striking down a New York law requiring at least 50 signatures from each county in the state). The Court's concern in the above cases involved the apparent "veto" power granted to a minority of the population to frustrate the apparent will of the majority as evidenced by a candidates apparent support in populous counties. See Buckley v. Valeo, 424 U.S. 1 (1976).

However, in Valeo, the Court upheld a portion of the federal financing laws which required candidates to run in 20 state primary elections in order to receive primary election funds. In doing so, the court noted that, in Moore, Illinois attempted to ensure that a candidate had statewide support before being placed on the ballot. The Illinois statute at issue in Moore permitted 7% of the state's population residing in the state's least populated 53 counties, to

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"block" the nomination of a candidate, assuming that all of them refused to sign a candidate's nomination petition. In the present case, the top ten most populated counties in Pennsylvania comprise only approximately 59% of the Democratic electors in the Commonwealth. The remaining 41% are distributed within the other 57 counties of the Commonwealth. Thus to successfully "block" the nomination of a candidate in Pennsylvania, (i.e. if a candidate collected 100 signatures from only 9 of the top 10 counties and could not obtain 100 signatures in any one of the remaining 58 small counties), it would take approximately 42% of the state's Democratic

Electors remaining, all refusing to sign the candidate's bid for nomination. It is obvious, therefore, that Pennsylvania's system is not nearly the alleged draconian plan struck down in Illinois, in Moore.

Additionally, the present case is easily distinguished from Moore, and the other cases cited above which followed Moore, in

another significant respect. In all of those cases, both the number and the percentage of counties from which signatures were required was far greater than that imposed by Section 912.1(3). In Moore, the statute at issue required 200 signatures from 50 of the state's 102 counties, or 49% of the counties in the state. In Rockefeller, the statute required 200 signatures from 30 of the 88 counties in the state, or 34% of the counties in the state. By contrast, Section 912.1(3) requires 100 signatures from only 15% of the counties within the Commonwealth.

Moreover, the case now before the Court does not implicate the "one man - one vote" principle. As this Court stated in Cavanaugh,

> The one person - one vote principle, upon which the candidate relies, as initially announced in Baker v. Carr was designed to remedy the unequal representational rights of voters. "The first principle inherent in our republican form of government is that individual citizens submit to rule by legislative fiat enacted by a majority of a popularly elected legislative body working within a constitutional framework. When the representatives to that legislative body are malapportioned among the several districts within the political unity, then the voting

strength of the individual citizens in these subdivisions is of unequal weight."

6

Cavanaugh, 444 A.2d at 1312 (quoting Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio 1960), appeal dismissed, 385 U.S. 3 (1966)). The present case does not involve an issue of unequal representational rights. The candidate is seeking his political party's nomination for the executive office of Governor. Clearly the governor is not a legislator in the sense that he does not espouse the cause of a particular constituency, but is rather the chief executive of the Commonwealth as a whole. Therefore, the representational concerns at the core of the one man - one vote principle are not present here and, thus, that principle does not apply.[3] Therefore, no

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[3]We note that we are not presented with a case involving voting power, but only "nominating power." We are mindful of the words of Justice Stewart in Moore in which he concluded that

> I cannot join in the Court's casual extension of the "one voter, one vote" slogan to a case that involved neither voters [or] votes...

fundamental rights are affected by the 10-county requirement.

Furthermore, the rational basis standard seems more applicable in this case given the greater deference and leeway extended to state elections as compared with the scrutiny of federal election cases. See Cavanaugh 444 A.2d at 1312 n.7. Because we conclude that the one man/one vote principle is not involved in the present case, therefore, neither is a fundamental right. Therefore, we must examine Section 912.1(3) under the rational basis standard.[4]

Moore, 394 U.S. at 818 (Stewart, J., dissenting). Likewise, in the present case, signing a nomination petition does not obligate any individual to vote for that candidate, but is meant to demonstrate only that the candidate has sufficient support throughout the state to ensure that his or her candidacy is not entirely frivolous and that the candidate has at least some area wide, if not statewide, appeal, which, of course, is a most legitimate state interest.

[4]We note that, even if Section 912.1(3) were to be considered under the strict scrutiny standard, the state's interests in keeping an organized ballot and requiring a candidate to demonstrate sufficient statewide support would be sufficiently compelling to uphold the statute. See Cavanaugh (citing American

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As such, it is Berg's

burden to demonstrate that Section 912.1(3) is not rationally related to a legitimate governmental interest. Hahn.

Applying the rational basis test, it is clear that the state has several legitimate interests in the signature requirements of Section 912.1(3), namely keeping the ballot free from chaos and requiring a modicum of area wide, if not statewide, support for a candidate. First, Section 912.1(3) ensures that the ballot will not be cluttered with candidates having only small, local support. Second, and perhaps more important to this case, it is clear that the 10-county requirement is designed to ensure that candidates do not merely obtain signatures from the most populous counties of the Commonwealth. No Gubernatorial candidate could satisfy the requirements of Section 912.1(3) without obtaining signatures of electors who are residents of at least some third through eighth class

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Party of Texas v. White, 415 U.S. 767 (1974); Lubin v. Panish, 415 U.S. 709 (1974); Jenness v. Fortson, 403 U.S. 431 (1971).

counties.[5] Section 912.1(3), is, therefore, rationally related to the furtherance of these objectives.

In response, Berg asserts that the state's interest in keeping an orderly ballot and requiring a candidate to demonstrate statewide support is neither a compelling nor legitimate governmental interest because there are alternative ways to achieve

such a purpose. We disagree. Any possible alternative to the county requirement would require either a "flat" number of signatures to have a candidate's name placed on the ballot, or would require signatures from a subdistrict in the state that would have a population base. Clearly, this would not provide sufficient evidence

---

[5]There is only one first class county, Philadelphia, and only one second class county, Allegheny. There are three second class A counties, Montgomery, Delaware, and Bucks. Thus, assuming that a candidate obtained 100 signatures from registered voters of the candidate's party in these five counties, he would still need 100 signatures from the electors in 5 of the other 62 counties designated as third class or lower.

of statewide support as a candidate could easily obtain twice the number of signatures currently required in either Allegheny or Philadelphia County alone.

Berg suggest that the commonwealth could achieve the same purpose by requiring a certain number of signatures from each congressional district because congressional districts are established on a population basis. Although it is certain that the population is more evenly divided in the congressional districts, this alternative would not achieve the same purpose as the current system. Pennsylvania has 20 congressional districts. Assuming arguendo that the Commonwealth adopted a system whereby a candidate needed to obtain 100 or more signatures from 10 of the 20 congressional districts (of course this would be a greater percentage, 50%, than the amount of counties currently required, which is approximately 15% or 10 out of 67 counties), a candidate could easily meet that requirement without evidencing statewide support. For instance, Philadelphia County encompasses the first, second, and third congressional districts. In addition, Allegheny County encompasses the fourth, fourteenth, eighteenth, and twentieth congressional districts. Thus, by collecting signatures in two counties of the Commonwealth, a candidate would have signatures from seven of

the ten required congressional districts. This would eviscerate one of the purposes underlying Section 912.1(3) of the Election Code. Thus, while it is clear that Section 912.1(3) does result in a minimal amount of inequality throughout the

Commonwealth, this minimal inequality is insufficient to support a finding that the statute fails the rational basis test. See Donatelli v. Mitchell, 2 F.3d 508 (3d. Cir. 1993). We, therefore, conclude that Berg has failed to carry his heavy burden of demonstrating that Section 912.1(3) is not rationally related to the furtherance of the Commonwealth's interests concerning the ballot.

Accordingly, we hold that Section 912.1(3) of the Election Code is constitutional, and we therefore turn to the petition to set aside Berg's nomination petition which alleges that he did not satisfy the requirements contained in that section.

At the hearing held on March 30, 1998, Berg was present and represented by counsel. Following a colloquy on the record, Berg, through his counsel, conceded that his petition did not contain

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the valid signatures of 100 Democratic electors in Dauphin County. On the basis of this concession, and our conclusion that Section 912.1(3) of the Election Code is constitutional, this Court will enter an order setting aside the nomination petition filed by Phil Berg and ordering the Secretary of the Commonwealth to remove Phil Berg's name from the Democratic ballot for the office of Governor for the May 1998 primary.

/s/
JOSEPH T. DOYLE, Judge

Appendix C

APPENDIX C: PROOF OF SERVICE.

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

IN THE MATTER OF: THE NOMINATION PETITION
OF PHIL BERG, DEMOCRATIC CANDIDATE
FOR THE OFFICE OF GOVERNOR OF PENNSYLVANIA
APPEAL OF PHIL BERG

PROOF OF SERVICE

I, Philip J. Berg, Esquire hereby certify that copies of the foregoing Petition for a Writ of Certiorari were forwarded to the following persons, with first-class postage prepaid, by depositing the same in a United States post office or mailbox this 7th day of August, 1998, that said service is in accordance with Rule 28 of this court and that the persons listed constitute all parties required to be served:

Appendix C

Prothonotary
The Supreme Court of Pennsylvania
Room 468, City Hall
Philadelphia, PA 19107

John J. Connelly, Jr., Esquire
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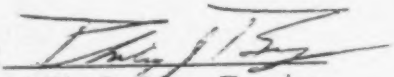
By: 
Philip J. Berg, Esquire
Attorney for Petitioner

(2)

FILED
SEP 9 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-273

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PHIL BERG
vs.
LOUIS B. KOZLOFF

On Petition for Writ of Certiorari From the Supreme Court of Pennsylvania, No. 39 M.D. Appeal Docket 1998

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the findings of the Pennsylvania Supreme Court affirming the Pennsylvania Commonwealth Court were correct that (a) the requirements of Pennsylvania's election law under 25 Pa.C.S.A. §2872.1(3) are constitutional, and that (b) the statute serves the legitimate purposes of avoidance of ballot clutter and the requirement that candidates for the nonfederal, statewide elective office of Governor must demonstrate more than local support for the office sought?

2. Whether the provision of Pennsylvania's election law at 25 Pa.C.S.A. §2872.1(3) imposes a "minimal amount of inequality" consistent with the United States Supreme Court's constitutional test of requiring election law restrictions to be at least reasonable and nondiscriminatory?

3. Whether the Commonwealth of Pennsylvania has remained within its scope of State Sovereignty in making ballot regulations for candidates who seek nonfederal, statewide elective office?

Suggested answer to all of the above: Yes.

PARTIES TO THE PROCEEDING

Petitioner: Philip Berg, Resident of Pennsylvania

Respondents: Louis B. Kozloff, Resident of Pennsylvania
D. Michael Fisher, Attorney General for the Commonwealth of Pennsylvania

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OPINIONS AND ORDERS BELOW

The unreported Opinion of the Pennsylvania Supreme Court, dated May 15, 1998 which was filed in support of the per curiam order of the Court dated May 11, 1998, affirmed the decision of the Commonwealth Court of Pennsylvania in striking Phil Berg's name from the May, 1998 Pennsylvania primary election ballot. Both Orders are reproduced in Appendix A of Petitioner's Petition for Writ of Certiorari before this Court.

STATEMENT OF JURISDICTION AND TIME FACTORS

The judgement of the Supreme Court of Pennsylvania was entered on May 11, 1998.

Petitioner properly invokes the appellate jurisdiction of this Court under 28 U.S.C. §1254(1) "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree" and

timely filed his appeal on August 12, 1998, within the 90 days allowed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions at issue in this case include: the First Amendment to the U.S. Constitution providing, in part:

> Congress shall make no law ... abridging the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

the Tenth Amendment to the U.S. Constitution providing:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

and the Fourteenth Amendments to the U.S. Constitution providing, in part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; or deny any person within its jurisdiction the equal protection of the laws."

The statutory provision at issue in this case is the petition signature requirement for a candidate (in a mainstream, not a third party) seeking to run for the nonfederal, statewide elective office of governor of Pennsylvania providing, in part:

> Candidates for nomination of officers listed below shall present a nominating petition containing at least as many valid signatures registered and enrolled members of the property as listed below:
>
> * * *
>
> (3) Governor: Two thousand including at least one hundred from each of at least ten counties.

25 Pa.C.S.A. §2872.1 (Act of June 3, 1937, P.L. 1333).

STATEMENT OF THE CASE

On March 10, 1998, following the time period for obtaining signatures for nomination petitions required to be placed on the Pennsylvania primary election ballot, Petitioner Berg filed with the Secretary of the Commonwealth a nomination petition as a prospective Democratic candidate for the office of Governor of Pennsylvania. His petition included

signatures from 10 counties, including 128 purported signatures from Dauphin County.

On March 17, 1998, Respondent Kozloff filed with the Pennsylvania Commonwealth Court a Petition to Set Aside the Nomination Petition of Phil Berg, challenging 54 of the purported signatures from the 128 listed on Berg's nomination petition from Dauphin County.

On March 25, 1998, before the evidentiary hearing in Commonwealth Court, Petitioner Berg filed an action in the United States District Court for the Eastern District of Pennsylvania, asking for (a) a declaratory judgement from that court that (a) the signature requirement of the election statute was unconstitutional, and (b) for injunctive relief preventing the Department of State from withholding petitioner's name from the ballot.

On March 26, 1998, Petitioner Berg filed a Motion to Dismiss the Petition to Set Aside the Nomination Petition.

On March 30, 1998 at the evidentiary hearing in

Commonwealth Court, some of the purported signatures on Petitioner Berg's nomination petition were found to be invalid, and Berg conceded that he failed to meet the minimum statutory requirements to run for the office of Governor.

On April 3, 1998, at an evidentiary hearing on the matter in the U.S. District Court for the Eastern District of Pennsylvania, Judge Katz denied Petitioner Berg's motion for relief, finding as a conclusion of law that by his own concession, Berg failed to meet the minimum statutory requirements of the Pennsylvania election law to gain access to the primary ballot.

On April 7, 1998, Judge Doyle of the Pennsylvania Commonwealth Court ruled that the statute in question was, and is, constitutional, and also found that Petitioner Berg failed to meet the minimum statutory requirements to gain access to the primary ballot. Judge Doyle ordered the Secretary of the Commonwealth to strike Berg's name as a candidate in the Democratic primary election held on May 19, 1998. Petitioner

appealed to the Pennsylvania Supreme Court.

Petitioner Berg also appealed his federal case to the United States District Court for the Third Circuit. Chief Judge Becker, after presiding over a hearing on the matter, dismissed the appeal on the grounds that the case was being considered on the merits in the Pennsylvania Supreme Court concurrently with Berg's identical appeal in the federal courts.

On May 11, 1998, the Pennsylvania Supreme Court affirmed the decision of the Commonwealth Court below, upholding the constitutionality of the statute.

On May 12, 1998 petitioner Berg made application to Justice Souter of the United States Supreme Court for an Emergency Order to stay the Orders of the Pennsylvania Supreme Court and Pennsylvania Commonwealth Court striking his (Berg's) name form the primary ballot. On May 15, 1998, Justice Souter denied the application.

Petitioner Berg timely filed the instant appeal with this Court on August 12, 1998, within the 90 days allowed

following the decision of the Pennsylvania Supreme Court which upheld the constitutionality of the state election statute.

ARGUMENT – REASONS FOR DENYING WRIT

1. The provisions of the Pennsylvania election law which govern the collection of signatures on the nomination petition for the office of governor are constitutional.

A. The provisions of the Pennsylvania Election Code are Constitutional.

In assessing the constitutionality of the statute in question, the Court must consider:

> ...the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for theburden imposedd by its rule. In passing judgement, the Court must not only determine the legitimacy and strength of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Council of Alternative Political Parties v. Hooks, 121 F.3d 876 (3d. Cir. 1997).

The Commonwealth Court of Pennsylvania below used this methodology to test the validity of appellant's challenge to the constitutionality of the Pennsylvania election law 25 Pa.C.S.A. §2872.1(3). The Court first determined whether to apply a strict scrutiny analysis or a rational basis analysis to the statute. Noting that "...if a law does not significantly affect a fundamental right or involve a suspect class, it is subject to a rational basis of review by the Court." Cavanaugh v. Schaeffer, 444 A.2d 1308 (Pa.Cmwlth. 1982.) Under this standard, it is the plaintiff who bears the heavy burden of overcoming the presumption that there exists a rational relationship between the statute and a legitimate governmental interest. Hahn v. United States, 757 F.2d 581 (3d. Cir. 1985).

The Court below found that the case at bar does not implicate the one person-one vote principle, and therefore "no fundamental rights are affected by the 10-county requirement" of the Pennsylvania election law. (See Judge Doyle's opinion, p. 7.) Previously, the Commonwealth Court, has stated:

> The one person-one vote principle . . . was designed to remedy the unequal representation rights of voters. "The first principle inherent in our republican form of government is that individual citizens submit to rile by legislative fiat enacted by a majority of a popularly elected legislative body working within a constitutional framework. When the representatives to that legislative body are malapportioned among several districts within the political unity, then the voting strength of the individual citizens in these subdivisions is of unequal weight."

Cavanaugh v. Schaeffer, 444 A.2d 1308 at 1312 (quoting Buchanan v. Rhodes, 249 F.Supp. 860 (N.D. Ohio 1960), appeal dismissed 385 U.S. 3 (1966)). This case is distinguished this case from the case at bar in that the appellant is seeking his party's nomination for the executive office Governor, not a legislative office. Thus the representational issue at the center of the one man-one vote principle is not present here, and the principle should not apply. Because the principle is not at issue in the case at bar, the strict scrutiny standard of review of the Pennsylvania election law provision at question should be evaluated under the rational basis test (below).

Likewise, Courts have noted that "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." Burdick v. Takushi 504 U.S. 428 (1992), citing: Bullock v. Carter, 405 US 134, 133, 31 L.Ed.2d 92, 92 S.Ct. 849 (1972); Andersen v. Celebrezze, 460 U.S. 780, at 788, 75 L.Ed.2d 547, 103 S.Ct. 1564 (1983), Donald v. Board of Election Comm'rs of Chicago, 394 US 802, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1969).

Appellant's argument that this case is similar to the precedent set 29 years ago in Moore v. Ogilvie (394 U.S. 814) is not correct. In Moore, the Court examined a constitutional challenge to an Illinois law requiring 25,000 signatures statewide, including 200 signatures from 50 of the state's 102

counties (or 49% of the counties) as a prerequisite to being placed on the primary ballot for the office of President of the United States. Moore has been used as support for striking down several provisions of other states' election codes, including an Ohio election statute requiring independent candidates to have 200 signatures from at least 30 of the state's 80 counties (or 37.5% of the counties), and a New York election law that required at least 50 signatures from each county (or 100% of the counties) in the state. See Socialist Labor Party v. Rhodes, 318 F.Supp. 1262 (S.D. Ohio, 1970), appeal dismissed, 409 U.S. 942 (1972) and Socialist Workers Party v. Rockerfeller, 314 F.Supp. 984 (S.D.N.Y.) aff'd., 400 U.S. 806 (1970).

The case at bar is distinguishable from Moore and those which followed Moore, in that the percentage of counties from which signatures were required was far greater than that imposed by the Pennsylvania election code. The Pennsylvania statute, 25 Pa.C.S.A. §2872.1(3), provides that a candidate for

the office of Governor must collect two thousand signatures, including one hundred from each of at least ten counties, or from only 14.9% of the counties in the Commonwealth. Thus, there is not, as in the New York and Illinois cases, an apparent "veto" power granted to a minority of the population to frustrate the apparent will of the majority as evidenced by a candidate's apparent support in populous counties. (In Pennsylvania, if a candidate collected 100 signatures from only 9 of the top 10 populated counties, and could not obtain 100 signatures from any one of the remaining 58 counties, it would take approximately 42% of the state's Democratic electors remaining, all refusing to sign the candidate's petition, to defeat the candidate's bid for nomination.)

Under the rational basis test, the Commonwealth has legitimate, articulable interests for legislating the signature requirements found in 25 Pa.C.S.A. §2872.1(3). This provision enables the state to ensure that the ballot will not be cluttered with candidates having only small, local support.

Likewise, the provision requiring at least one hundred signatures from each of at least ten counties is designed to ensure that candidates do not merely obtain signatures from the most populated counties of the Commonwealth (i.e. Philadelphia, Allegheny, Montgomery, Delaware, and Bucks). Any successful candidate for Governor is required to collect signatures from registered voters in at least five of the remaining 62 counties (or slightly more than 8% of the remaining counties).

B. The Provisions of the Pennsylvania Election Code provide for a "Minimal Amount of Inequality" Consistent with the U.S. Supreme Court's Requirements that Such Regulation be "Reasonable and Nondescriminatory."

In his Opinion below, Judge Doyle noted that "...while it is clear that [the election code provision] does result in a minimal amount of inequality throughout the Commonwealth, this minimal inequality is insufficient to support a finding that the statute fails the rational basis test." (See Opinion of Judge Doyle, page 10.) This rationale comes from an analysis of the

Fourteenth Amendment in which the United States Supreme Court has long held:

> The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is done without any reasonable basis, and therefore is purely arbitrary. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, at 78, 55 L.Ed 369, at 377, 31 S.Ct. 337 (1911), followed by the United States Court of Appeals for the Third Circuit most recently in Donatelli v. Mitchell, 2 F.3d 508 (3d. Cir. 1993). In this case, Judge Doyle has ruled that the "inequality" with which the candidate is burdened is "minimal." The burden that 25 Pa.C.S.A. §2872.1(3) places on the appellant was minimal. Thus, the case at bar fits within the requirements that the United States Supreme Court has set, stating that regulatory

statutes are permissible if they impose "reasonable nondiscriminatory restrictions" on voters rights for the purpose of satisfying important governmental interests. Burdick v. Takushi 504 U.S. 428 119 L.Ed.2d 245, 112 S.Ct. 2059 (1992). The Burdick Court said:

> "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure. [Citations omitted.] It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. [Citations omitted.] ...Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' Storer v. Brown, 415 U.S., 724, 730, 39 L.Ed.2d 714, 94 S.Ct. 1274 (1974)."

Burdick, 504 U.S. 428, at 433.

The United States Supreme Court has also recognized that to achieve a proper objectives:

> "...States have enacted comprehensive and sometimes complex election codes. Each

> provision of these schemes, whether it governs the registration and qualification of voters, *the selection and eligibility of candidates*, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." (Emphasis added.)

Andersen v. Celebrezze, 460 U.S. 780, 75 L.Ed.2d 547, at 557, 103 S.Ct. 1564 (1983). And, again in Andersen, the Court noted in passing that "It seems to us that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable. Id., 460 U.S. 780, at 788 (see footnote #10).

25 Pa.C.S.A. §2782.1(3) embodies the very principle outlined by the Andersen Court, and imposes a minimal burden on the potential candidate to meet an important state interest, calling for a candidate for statewide office to demonstrate more than mere local support for the office he

seeks. The statute does so within the framework of being reasonable (requiring signatures in less than 15% of the counties, notably of the candidate's choosing) and within the framework of being nondiscriminatory. The statute, therefore, meets the requirements of an election code regulation as set forth by the United States Supreme Court, allowing for the imposition of "reasonable nondiscriminatory restrictions" on voters rights for the purpose of satisfying important governmental interests. See Burdick, supra.

2. The restrictions in the Pennsylvania election code promote legitimate state interests, including the avoidance of ballot clutter, and the requirement that candidates for Governor must demonstrate something more than local support for the office they seek.

As outlined above, the provisions of the Pennsylvania election code that require a geographic distribution for signatures on nomination petitions for non-federal, statewide officeholders are designed with legitimate interests of the Commonwealth in mind.

The United States Supreme Court has also stated that

"The procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process." Lubin v. Panish 415 U.S. 709, 715 (1974). The Commonwealth Court below agreed that keeping the ballot free from chaos is a legitimate interest the Commonwealth of Pennsylvania has in the signature requirement of 25 Pa.C.S.A.§2872.1(3). See Opinion of Judge Doyle, page 8.

The United States Supreme Court has recognized that "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot -- the interest, if no other in avoiding confusion, deception, and even frustration of the democratic process at the general election." Jenness v. Fortson 403 U.S. 431, 442

(1971). Again, the Court below agreed that the Commonwealth of Pennsylvania has a legitimate state interest in requiring a modicum of area wide, if not statewide support for a candidate. See Opinion of Judge Doyle, page 8.

The signature requirements found in 25 Pa.C.S.A. §2872.1(3) ensure that the ballot will not be cluttered with candidates having only small, local support. Likewise, the provision requiring at least one hundred signatures from each of at least ten counties is designed to ensure that candidates do not merely obtain signatures from the most populated counties of the Commonwealth. For these reasons, the Commonwealth can articulate clear, legitimate state interests for enacting 25 Pa.C.S.A. 2872.1(3), and the statute should be held constitutional under the rational basis test of review.

3. In the Court below, the Appellant admitted on the record that he failed to meet the requirements of the statute in order to be a candidate for Governor.

At the evidentiary hearing in the Commonwealth Court, Appellee Kozloff's challenge to the appellant's nomination

petition resulted in the admission of the appellant on record that he failed to meet the minimum statutory requirements of 25 Pa.C.S.A. §2872.1(3), by failing to collect a minimum of 100 signatures in at least 10 counties, as required by statute. Through his counsel, the appellant conceded that his petition did not contain the valid signatures of 100 Democratic electors in Dauphin County. See Opinion of Judge Doyle, page 10. On the basis of this concession, his failure to meet the minimum requirement of 25 Pa.C.S.A. §2782.1(3) was, and remains, sufficient for the Commonwealth Court to order the appellant's name struck from the ballot in the primary election scheduled for May 19, 1998.

4. The Commonwealth of Pennsylvania remains within its scope of State Sovereignty in making ballot regulations for nonfederal candidates for statewide office.

The United States Supreme Court has noted that while the Equal Protection Clause provides a check on state authority, "[the Court's] scrutiny will not be so demanding where we deal

with matter resting firmly within a State's constitutional privileges." Gregory v. Ashcroft, 501 U.S. 452, at 462 (1991) (quoting Sugarman v. Dougall, 413 U.S. 643, at 648 (1973)). Thus, the United States Supreme Court has recognized that states are constitutionally responsible for the establishment and operation of their own governments respectively. Respondent respectfully submits that this includes making regulations governing the qualifications of candidates for nonfederal, statewide elective office. The Respondent also respectfully contends that the sovereignty and independence of the Commonwealth of Pennsylvania as a viable actor in the constitutional system should be carefully weighed in the case at bar. The preservation of state sovereignty in this instances is not inconsistent with the requirements of the United States Constitution, as demonstrated above.

In the case of Clemens v. Fashing, 457 U.S. 957 (1982), the United States Supreme Court upheld provisions of the Texas Constitution which restricted a public official's ability to

run for another public office. In his concurring opinion, Justice Stevens defined the issue presented in the case as "whether there is any federal interest in requiring a State to define the benefit and burdens of different elective state offices in any particular manner." Id, at 973 (1982). He concluded that there was "no federal interest" in the state's self- regulation of the election of state officers, and therefore did not require the state to assert any interest at all to survive equal protection scrutiny. Id, at 976. Justice Stevens has also noted that "The Equal Protection Clause certainly was not intended to require the States to justify every decision concerning the terms and conditions of state employment according to some federal standard." Id, at 975. The Respondent respectfully contends that the interest of the Commonwealth of Pennsylvania as a sovereign body should be carefully weighed when determining the validity of its regulation of candidates for nonfederal, statewide elective office.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

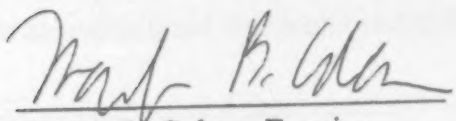
The Pennsylvania Supreme Court has correctly held that 25 Pa.C.S.A. §2872.1(3) of Pennsylvania's election statute is constitutional. The statute serves legitimate purposes of (1) the avoidance of ballot clutter and (2) requiring that candidates for the nonfederal, statewide office of Governor must demonstrate more than local support for the office they seek.

The statute imposes a burden of only a minimal amount of inequality," and that this minimal burden is consistent with the United States Supreme Court's constitutional test of requiring election law restrictions to be at least reasonable and nondiscriminatory.

The Commonwealth of Pennsylvania has remained squarely within its scope of State Sovereignty in making ballot regulations for candidates who seek nonfederal, statewide elective office.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,



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PROOF OF SERVICE

No. 98-273

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PHIL BERG
vs.
LOUIS B. KOZLOFF

I, Mark B. Cohen, Esquire, hereby certify that copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari in the above-captioned matter were forwarded to the following persons, by First Class Mail postage prepaid, by depositing the same in a United States Post Office or mailbox this 8th day of September, 1998, that said service is in accordance with Rule 28 of the Rules of the United States Supreme Court, and that the persons listed constitute all parties required to be served:

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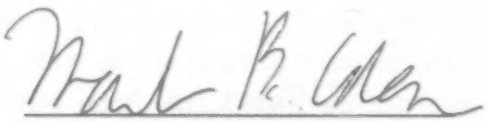

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SUPREME COURT, U.S.

No. 98-273

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PHIL BERG
vs.
LOUIS B. KOZLOFF

On Petition for Writ of Certiorari From the
Supreme Court of Pennsylvania,
No. 39 M.D. Appeal Docket 1998

REPLY BRIEF

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ARGUMENT

THE REQUIREMENTS OF PENNSYLVANIA ELECTION LAW UNDER 25 PA.C.S.A. §2872.1(3) ARE UNCONSTITUTIONAL AS PREVIOUSLY DETERMINED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

The restrictions within and perpetuated by the Pennsylvania Election Code 25 Pa.C.S.A. §2872.1(3) neither promote legitimate state interests nor establish state sovereignty. Rather such provisions can not and have not stood the test of constitutionality. This is clearly evidenced and supported by the federal 1979 decision in Elliott v. Shapp, in which the Court struck down the very same provision at issue in the matter at hand. Further, the legislative response to this issue was to remove the county signature requirement of subsection (1) dealing with the President and subsection (2) dealing with the United States Senate. Because the decision was unreported, and since it is on point, the text of the case follows in full. The full text is included to avoid any appearance of selective excerpts or interpretation. It must be noted that neither the Pennsylvania Courts nor the Respondent have chosen to acknowledge this decision or to further distinguish it or any other issues within Petition's brief. It is Petitioner's position that the decision in Elliott v. Shapp is dispositive.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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Appendix A

APPENDIX A: MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DATED MARCH 9, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK E. ELLIOTT, and STEPHEN BEECH, individually and on behalf of all other qualified voters similarly situated	
vs.	CIVIL ACTION NO. 76-1277
MILTON J. SHAPP, individually and as Governor of the State of Pennsylvania, and C. DELORES TUCKER, individually and as Secretary of Commonwealth of Pennsylvania	

MEMORANDUM

CAHN, J. March 9th, 1979

On October 28, 1976, this court issued an Order declaring part of the Pennsylvania Election Law, PA. STAT. ANN. tit. 25,

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§2872(a) (Purdon), unconstitutional.[1] The court further ordered that until the Pennsylvania legislature acted in accordance with its decision,

> [T]he names of candidates for statewide offices covered by 25 P.S. §2872(a) will be placed on the ballot upon the presentation of nomination petitions signed by one thousand registered and enrolled members of the proper party without respect to the county in which they reside.

On October 27, 1977, the court of appeals vacated the order and remanded the case to this court. Elliott v. Shapp, No. 77-1039 (3d

---

[1]Section 2872(a) provides that:

> Number of signers required; nomination petition of candidates at primaries shall be signed
>
> (a) If for the office of President of the United States, or of United States Senator, by at least one hundred registered and enrolled members of the proper party in each of at least ten counties of the State.

Cir. Oct. 27, 1977).

Although the court of appeals did not address the merits of plaintiffs' challenge to the constitutionality of §2872(a), it did find that plaintiffs' cause of action was not barred by the mootness doctrine. Nevertheless, the court held that this court's decision had been premature and had deprived the defendants of an opportunity to develop a full record. That error has now been corrected. On November 21, 1977, the plaintiffs moved for summary judgment; thereafter, the defendants cross-moved for summary judgment. After the parties submitted numerous affidavits, the court heard oral argument on their motions. The case is therefore ripe for decision.

In their complaint, plaintiffs asked for a three-judge court. Since they initially sought injunctive relief, 28 U.S.C. §2281 would require disposition by a court of three judges.[2] As this court's order

---

[2]Section 2281 provided that:

> An interlocutory or permanent injunction restraining the enforcement, operation or

of October 28, 1976,

2.

> execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Although §2281 was repealed in 1976, §7 of the repealing legislation expressly provided that "[t]his Act ... shall not apply to any action commenced on or before the date of enactment." Pub. L. 94-381, 90 Stat. 1119 (1976). Since Pub. L. 94-381 was enacted on August 12, 1976, and this action was filed on April 13, 1976, it is clear that §2281 applied to this case if the plaintiffs had not withdrawn their prayer for an injunction. (See infra).

demonstrates, the case (with an off-the-record concurrence of both counsel) was decided by a single judge without discussion of the three-judge court issue. In its October 27, 1977, order, the court of appeals noted that "[t]he disposition of the prayer in the complaint seeking a three-judge court is not before us." After the case was remanded to this court the plaintiffs at a formal hearing withdrew their prayer for injunctive relief. They believed that by so doing they would remove the case from the literal confines of §2281 and thus eliminate the need for convening a three-judge court. Redfearn v. Delaware Republican State Committee, 502 F.2d 1123, 1129 (3d Cir. 1974). However, in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Court expressly left open the question of "[w]hether an action solely for declaratory relief would under all circumstances be inappropriate for consideration by a three-judge court." 372 U.S. at 154. See Spencer v. Kugler, 454 F.2d 839 (3d Cir. 1972). This court must now determine whether §2281 mandates that the case, presently an action seeking only declaratory relief, should

nevertheless be decided by a court of three judges.[3]

The Supreme Court decided Mendoza-Martinez by examining whether trial before a single judge would frustrate the policy behind the three-judge court statute. Thus, the

Court reasoned that since the case involved a request for noncoercive relief and the order entered only declared the statute unconstitutional, failure to convene a three-judge court would not thwart the policy behind §2281.

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[3]Although in Redfearn v. Delaware Republican State Committee, 502 F.2d 1123, 1129 (3d Cir. 1974), Judge Gibbons wrote that "[i]f the plaintiff's withdraw their request for injunctive relief the case may proceed before a single judge," this statement may not be the law of this circuit. Not only was the statement dicta made without reference to or discussion of either Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), or Spencer v. Kugler, 454 F.2d 839 (3d Cir. 1972), but the panel was sharply divided on the resolution of of the three-judge court issue. [Ibid].

Appendix A

A district court must study the facts of each case and apply the analysis developed by the Court in Mendoza-Martinez. At the present time the pleadings in the instant case, like those in Mendoza-Martinez, contain only a request for noncoercive declaratory relief.[4] Any order entered by this court will not contain injunctive sanctions.[5] Therefore, like the Court in Mendoza-Martinez, I find

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[4]Although the Court in Mendoza-Martinez noted that the plaintiff had never sought anything other than declaratory relief, the Court did not discuss how its decision would have differed if the plaintiff had initially sought injunctive relief and later withdrawn that request, leaving only a prayer for declaratory relief. Given the liberal amendment provisions of the Federal Rules of Civil Procedure, I find that I must decide the case on the basis of the complaint as amended. To hold otherwise would negate the liberality contemplated by those who drafted Rule 15. I will therefore treat this case as an action for declaratory relief. This result is consistent with the court of appeals' dictum in Redfearn v. Delaware Republican State Committee, 502 F. 2d 1123, 1129 (3d Cir. 1974).

[5]Notwithstanding that the case was filed "on behalf of all other qualified

that decision by one judge will not thwart the congressional policy underlying the three-judge court statute.[6] I will now examine the merits of this case.

4.

I hold that PA. STAT. ANN. tit. 25, §2872(a) (Purdon), is unconstitutional as applied in this case because it dilutes the franchise rights of some citizens of this Commonwealth and is not

---

voters similarly situated," the plaintiffs never sought to have the case certified as a class action and no class was ever certified. Thus, my decision in this case binds only the named parties.

[6]Given that §7 of Pub. L. 94-381 also governs the application of 28 U.S.C. §2284, I need not decide whether that section, as amended by Pub. L. 94-381, would require a three-judge court if this action had been instituted after August 12, 1976. Under the law as it existed prior to August 12, 1976, only §2281 could have required the convening of a three-judge court to hear this case because §2284 as it existed then merely set forth the procedure to be followed in convening such a court.

justified by a compelling state interest. Moore v. Ogilvie, 394 U.S. 814 (1969); see, Reynolds v. Sims, 377 U.S. 533 (1964). My reasons for so holding are set forth in more detail in my Memorandum and Order of October 28, 1976, and need not be repeated here.[7] I only wish to expand on two points.

First, I find that the statute involved in this case has a negative impact on the franchise and warrants strict scrutiny under the equal protection clause of the Fourteenth Amendment. In this case the county allocation requirement which plaintiffs challenge is the direct cause of plaintiff Elliott's inability to get his name on the primary election ballot.[8] It is irrelevant that perhaps he could have

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[7]The portions of that Memorandum which address the merits of plaintiffs' complaint are incorporated by reference herein. For convenience a copy of that Memorandum is attached hereto as Exhibit "A". [Exhibit is not attached].

[8]Although plaintiff Elliott was a candidate in the primary election which prompted this action, plaintiff Beech is simply a registered voter, who claims that the statute in question abridged his right

complied with the statute had he tried harder. An election code which weights the franchise rights of residents of one county more heavily than those residents of another county denies the deprived voters equal protection

5.

of the laws.[9] Such weighting is precisely what the equal protection

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to vote. Indeed, he filed this action "individually and on behalf of all other qualified voters similarly situated." Therefore, it is proper for this court to rule on the issue of whether §2872 abridges a citizen's right to vote. Compare Bullock v. Carter, 405 U.S. 134 (1972), discussed in text infra.

[9]It is interesting to note that the Pennsylvania Supreme Court recognized this problem and expressly construed the Pennsylvania Constitution so as to avoid it. Article II, §16 of the Pennsylvania Constitution provides, inter alia, that "no county shall be divided unless entitled to two or more Senators.... No ward, borough, or township shall be divided in the formation of a district." To circumvent the argument that such reliance on local political units violated the equal protection clause of the Federal

Constitution as interpreted in Reynolds v. Sims, 377 U.S. 533 (1964), the Pennsylvania Supreme Court held that Article II, §16 required only

> [T]hat senatorial reapportionment legislation must maintain the integrity of counties and other political subdivisions, insofar as possible, and must provide for compact districts of contiguous territory, subject always to the overriding objective and mandate that such districts shall be 'as nearly equal in population as may be.'

Butcher v. Bloom, 415 Pa. 438, 463 (1964). The court

> [E]mphasize[d] that, if necessary, any political subdivision or subdivisions may be divided or combined in the formation of districts where the population principle cannot otherwise be satisfied. Furthermore, the number of senators per political subdivision may not be limited if such limitation violates the equal-population principle.

438 Pa. at 463-4 See also, Scranton v. Drew, 229 F.Supp. 310 (M.D. Pa.), vacated and remanded, 379 U.S. 40 (1964).

Thus, Pennsylvania's own courts have been concerned with the constitutional problems presented by county based allocation schemes. However, I do not think that the case presents an unsettled

clause was designed to prevent. Reynolds v. Sims,

6.

377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). Like the Illinois statute involved in Moore v. Ogilvie, 394 U.S. 814 (1969).

> This law ... discriminates against the residents of the populous counties of the State in favor of rural sections. It, therefore, lacks the equality to which

---

question of state law requiring a federal court to abstain from reaching a decision under the doctrine of Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). The statute in question here is clear, specific, and precise on its face; it does not lend itself to the kind of saving construction applied by the Pennsylvania Supreme Court in Butcher, which involved a more loosely worded provision of the state constitution. Moreover in ruling on the validity of plaintiff Elliott's nomination petition, the Pennsylvania Commonwealth Court gave the statute a literal construction. Nomination of Elliott, 362 A.2d 438 (Pa. Cmwlth. 1976). Thus, Pennsylvania courts have construed the statute, and there is no unsettled question of state law requiring this court to abstain from reaching a decision.

> the exercise of political rights is entitled under the Fourteenth Amendment.

394 U.S. at 819. Compare Udall v. Bowen, 419 F. Supp. 746 (S.D. Ind.), aff'd, 425 U.S. 947 (1976) (allocation based on congressional districts of approximately equal population held constitutional). Like the Supreme Court in Moore I have concluded that this statute has an adverse effect upon the franchise, and that it cannot withstand the strict scrutiny to which I must subject it.

Other authorities have suggested that the degree of impact on the franchise should always govern the standard of review in this type of case; Udall v. Bowen, 419 F.Supp. 746, 748-49 (S.D. Ind.), aff'd, 425 U.S. 947 (1976); Zautra v. Miller, 348 F.Supp. 847, 849-50. (D. Utah 1972). See Note, 50 TEMPLE L.Q. 911, 917-18 (1977). However, I respectfully decline to follow their analysis.[10]

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[10]The Commonwealth's argument that the Moore analysis should not be applied in this case because the impact on the franchise is more indirect in this case

Appendix A

In Moore the Court made

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no distinction based on the degree of the burden that the statute placed on the franchise. Rather, the court examined whether the

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than in Moore is ingenious but without merit. The Commonwealth has urged that the Court applied strict scrutiny in Moore because an individual signature on a nominating petition for an independent candidate was precisely analogous to the casting of the vote in a primary election for one of the two established parties. Having held that a primary election was an integral part of the election process, the Court had to treat the signatures in Moore like votes cast in the primary election itself. However, the argument runs, this case is different because the signatures required by the statute involved in this case simply served to get an individual's name on the primary election ballot. Therefore, the Commonwealth urges that unlike the signatures in Moore, the signatures here are not analogous to the casting of a vote in the primary election itself. Although the Commonwealth is correct in asserting that there is a difference between Moore and the case at bar, I do not consider this difference material.

statute involved in that case burdened the franchise and, having found that it did, the Court found the statute unconstitutional. I must do likewise. Note, Representation on Party Committees, 88 YALE L.J. 167, 173 n. 26 (1978).

The Court's decision in Bullock v. Carter, 405 U.S. 134 (1972), does not require a different conclusion. In that case the Court analyzed the constitutionality of a Texas statute which required the payment of exorbitant fees before an individual could become a candidate for a primary election. In determining the standard of review to which it would subject the provision in question, the Court noted that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." 405 U.S. at 143 (citation omitted). However, the Court also noted that "Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast." Id. (footnotes omitted). Furthermore, the Court explained that the issue of the standard to be applied in the

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case before it was an open question only because "[t]he initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review." 405 U.S. at 142-3 (footnote omitted). By contrast to Bullock, in this case I must pass on the constitutionality of a statute which dilutes the impact of the signatures of some voters directly. Unlike the statute

involved in Bullock, the statute in this case "quantitatively dilutes the votes that have been cast," and has a direct impact on the voters themselves. Since the case before me involves a situation expressly distinguished by the Bullock court, it cannot be covered by the decision in Bullock.[11]

---

[11]Furthermore, even if I were to follow the Bullock reasoning, I would find that the statute in this case must pass strict scrutiny. Like the Texas filing fee in Bullock, the statute in this case

Second, the fact that this statute applies to primary elections and major party candidates rather than to general elections and independent candidates, does not affect the degree of scrutiny required. In Gray v. Sanders, 372 U.S. 368, 381 (1963), the Supreme Court announced the "one person one vote" rule and applied it to state conducted primary elections. Later, in Moore, the Court stated that "[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote." 394 U.S. at 818 (citations omitted). I find that the method of getting a candidate's name on the ballot is an integral part of the election process regardless of whether the candidate is a party member or an independent. I also find that the statute in question in this case

---

institutes a scheme which "has a real and appreciable impact on the exercise of the franchise," 405 U.S. at 144, by giving voters in more densely populated counties less of a voice in the choosing of primary election candidates.

abridges the right to vote by diluting the impact of signatures of voters who reside in more heavily populated counties.

It is this dilution which makes the case sub judice comparable to the cases which held invalid similar

9.

county allocation requirements for independent candidates. See Communist Party of Illinois v. State Board of Elections, 518 F.2d 517 (7th Cir.), cert, denied, 423 U.S. 986 (1975); Socialist Labor Party v. Rhodes, 318 F.Supp. 1262 (S.D. Ohio 1970), aff'd 409 U.S. 942 (1972); Socialist Workers Party v. Rockefeller, 314 F.Supp. 984 (S.D. N.Y.), aff'd 400 U.S. 806 (1970); Socialist Workers Party v. Hare, 304 F.Supp. 534 (E.D. Mich. 1969). For most political candidates, having their name on the primary election ballot is a necessary predicate to winning a primary or general election. A statute which imposes a county distribution requirement as a prerequisite to a candidate's having his name placed on the

ballot, as does the statute at issue in this case, affects an integral part of the electoral process whether that candidate is a party member or an independent. This type of statute dilutes the impact of the signatures, or votes, of residents of larger counties and thus abridges their right to vote.

In my view the philosophy of Baker v. Carr, Reynolds v. Sims, and their progeny prohibit the dilution of the franchise rights of some voters by the institution of a county-based allocation system. Like the statute in Moore, §2872(a) burdens the franchise in an integral part of the electoral process and must be declared unconstitutional unless the Commonwealth can show that this abridgment is justified by the existence of a compelling state interest. The Commonwealth has not made this showing. As I explained in my Memorandum of October 28, 1976, the Commonwealth's legitimate desire to insure that a candidate has reasonable support can be accomplished by means which do not dilute the franchise rights of some voters. Moore v. Ogilvie, 394

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U.S. 814, 818-19 (1969). Thus there is no compelling state interest present to justify the abridgement of a fundamental right. Reynolds v. Sims, 377 U.S. 533 (1964).

I therefore grant the plaintiff's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and deny the defendants' cross-motion for summary judgment. An order will be entered accordingly.

Edward N. Cahn, J.

11.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK E. ELLIOTT, and STEPHEN BEECH, individually and on behalf of all other qualified voters similarly situated	:	
vs.	:	CIVIL ACTION NO. 76-1277
MILTON J. SHAPP,	:	

Appendix A

individually and as Governor :
of the State of :
Pennsylvania, and :
C. DELORES TUCKER, :
individually and as :
Secretary of Commonwealth :
of Pennsylvania :

ORDER

AND NOW, this 9 day of March, 1979, IT IS ORDERED that Richard Thornburg be substituted for Milton J. Shapp and Dr. Ethel Allen be substituted for C. Delores Tucker as defendants in this case pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment pursuant to Rule 56 is GRANTED and the defendants' cross-motion for summary judgment is DENIED. PA. STAT. ANN. tit 25, §2872(a) (Purdon) is hereby DECLARED UNCONSTITUTIONAL insofar as it requires that party members signing a nominating petition be residents of different counties.

Appendix A

BY THE COURT:

Edward N. Cahn, J.

Appendix B

APPENDIX B: PROOF OF SERVICE.

NO. 98-273

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PHIL BERG
vs.
LOUIS B. KOZLOFF

PROOF OF SERVICE

I, Philip J. Berg, Esquire hereby certify that copies of the foregoing Reply Brief were forwarded to the following persons, with first-class postage prepaid, by depositing the same in a United States post office or mailbox this 15th day of October, 1998, that said service is in accordance with Rule 28 of this court and that the persons listed constitute all parties required to be served:

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